

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Petition of GCB Communications,)	WC Docket No. 11-141
Inc. d/b/a Pacific Communications)	
And Lake Country)	
Communications, Inc. for)	
Declaratory Ruling)	
)	

**COMMENTS OF THE AMERICAN PUBLIC COMMUNICATIONS COUNCIL
AND APCC SERVICES, INC.**

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The American Public Communications Council (“APCC”)¹ and APCC Services Inc.² (jointly referred to as “APCC” unless the context clearly indicates otherwise), pursuant to the Commission’s Public Notice,³ hereby jointly submit these comments on the Petition⁴ filed in the above captioned proceeding.

¹ APCC is the national trade association of independent payphone service providers (“PSP”)s and has participated in every major Commission proceeding involving payphones since 1984, including every proceeding leading up to and the proceeding adopting the current Rule, 47 C.F.R. § 64.1300-1320 (“Rule”)’ and in virtually every court action stemming from those proceedings as well as other major proceedings and litigation involving development and implementation of the Commission’s current Rules payphone compensation Rules.

² APCC Services is a subsidiary of APCC that acts as a billing aggregator for PSPs in collecting dial around compensation and engages in collections activities, including formal and informal complaint proceedings at the Commission, and litigation in the courts, on behalf of its PSP customers. Since inception of the Commission’s dial around regimes, APCC Services has been required to bring dozens and dozens of collection proceedings on behalf of its customers.

³ Public Notice, “Wireline Competition Bureau Seeks Comment on Petition to Clarify Payphone Service Providers’ Responsibilities With Respect To the Transmission of Payphone-Specific Coding Digits”, DA 11-1450 (Released August 31, 2011).

⁴ Petition of GCB Communications, Inc. d/b/a Pacific Communications And Lake Country Communications, Inc. for a Declaratory Ruling Petition to Clarify Payphone Service Providers’ Responsibilities With Respect To the Transmission of Payphone-Specific Coding Digits In Order To Receive Per Call Dial Around Compensation For Completed Calls (filed August 9, 2011) (hereafter “Petition”).

INTRODUCTION AND SUMMARY

The Petition is an outgrowth of a ruling by the United States Court of Appeals for the Ninth Circuit in *GCB Comms v. U.S. South Comms*.⁵ At issue in that case was whether U S South Communications (“USSC”) could avoid paying dial-around compensation for *calls that both parties agreed had originated from GCB’s payphones* because U S South claimed it had not received the correct Flex ANI digits along with the calls.

In answering this question, the Court made two errors. First, the Court, interpreting language contained in Commission orders, held that in order to receive dial-around compensation, PSPs must demonstrate that the LEC actually sent the payphone-specific coding digits into the network⁶ and that a District Court must inquire as to whether the digits were actually sent.⁷ Second, despite Section 276(b)(1)(A) of the Communications Act unequivocal requirement that PSPs be paid DAC for “each and every completed call” from their payphones.⁸ the Court left open the question of whether a Completing Carrier, here USSC, would have to pay dial-around compensation if the Completing Carrier did not receive payphone-specific coding digits. On remand to the United States District Court, the District Court made a primary jurisdiction referral of the matter for the Commission to construe the language addressed by the Court of Appeals.⁹

The Petition asks the Commission to affirm that, under the DAC rules, (1) the PSP’s only obligation with respect to payphone-specific coding digits is to order a payphone line from the LEC and (2) if a PSP has done so, the Completing Carrier must pay compensation for payphone-

⁵ No. 09-17646 (9th Cir. April 29, 2011) (hereafter “*GCB*”),

⁶ *Id.*, Slip Op. at 5595.

⁷ *Id.* 5593.

⁸ 47 U.S.C. § 276(b)(1)(A).

⁹ The District Court’s Order referring the matter is attached to the Petition.

originated calls regardless of whether the Completing Carrier received payphone-specific coding digits with the calls in question.

APCC supports grant of the Petition. Rather than repeat the analysis contained in the Petition, APCC makes several additional points. With regard to the Court's first error, that PSPs are required to ensure that Flex-ANI digits are in fact transmitted by the LEC, APCC advances two arguments. First, we show in that PSPs cannot bear responsibility for ensuring the transmission of coding digits because the rules and their underlying logic unequivocally place that obligation on the Completing Carrier. In addition, we explain why the Commission could not have placed the responsibility on PSPs because it would have resulted in a wholly unworkable scheme.

As to the Court's suggestion that Completing Carriers may be able to avoid paying compensation on payphone-originated calls if the Completing Carrier failed to receive coding digits, the error turns on the underlying misreading of the Commission's language and rules to say that payphone-specific coding digits must accompany each payphone call as a prerequisite to compensation. The Commission has not ever ruled, but has been absolutely explicit to the contrary. Compensation is due for payphone-originated calls regardless of whether the carrier does or does not receive coding digits. While this point is treated in the Petition, APCC makes an additional point. Section 276 requires compensation for all calls, and the Commission's rules place the obligation to meet that statutory mandate solely and entirely on Completing Carriers. Any ruling that excused Completing Carriers from paying for some calls would thus directly violate Section 276. The *only* way the Commission could so rule would be to initiate a new rulemaking in which it identified the calls that it was removing from those that completing carriers must compensate. The Commission would have to identify to whom and under what circumstances liability for paying for those calls would shift.

USSC has filed early comments in the form of an opposition¹⁰ to the Petition and seeks alternate relief. Although USS casts its request as seeking a ruling that Completing Carriers may permissibly rely on Flex-ANI as a means of tracking payphone calls, the net of the USS request is for a ruling that if payphone-specific coding digits are not received by the Completing Carrier, the Completing Carrier is relieved of the obligation to pay compensation -- even where the calls are shown to have originated from a payphone -- notwithstanding the Commission's compensation Rule and Section 276. As discussed below, this completely subverts the point of the payphone-specific digit coding requirement. Under USSC's approach, payphone-specific coding digits would go from being a tool to help carriers comply with their statutory obligation to pay DAC on "each and every completed" payphone call to being a barrier that must be overcome by PSPs.¹¹

I. THE COMMISSION SHOULD RULE THAT PSPS WHO HAVE ORDERED PAYPHONE LINES ARE ELIGIBLE FOR COMPENSATION, AND ARE NOT RESPONSIBLE FOR THE TRANSMISSION OF PAYPHONE DIGITS.

The Petition set forth at length why the language construed by the Court of Appeals had been misinterpreted,¹² providing the context in which the language appeared, and that discussion will not be repeated here.¹³ As we have explained above,¹⁴ the Court of Appeals ruled that PSPs

¹⁰ Opposition of U.S. South to Petition for Declaratory Ruling (hereafter "USS Opp") (filed August 31, 2011).

¹¹ These are initial comments filed in support of the Petition. As noted, USSC has filed early comments as an opposition to the Petition. APCC is commenting on the USS Opp as appropriate to these initial comments. Nonetheless, APCC reserves the right to further comment and reply to the USS Opp in the reply comments in this proceeding.

¹² Petition at 29-37.

¹³ The history of the Commission's implementation of its mandate is set forth at length in the Petition. See Petition at 9-28. We recap that history here for the convenience of the Commission and to set context. In the 1996 *Payphone Orders*, the Commission required local exchange carriers ("LECs") to implement a system for transmitting payphone-specific coding digits to interexchange carriers ("IXCs") along with the payphone ANI with each call originating from each payphone line. See *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 20541, 20591 ¶ 98 ("First Payphone Order"); Order on Reconsideration, 11 FCC Rcd 21233, 21266 ¶ 64 (1996) ("First Payphone Reconsideration Order") (collectively, the "*Payphone Orders*"). The transmission of payphone-specific coding digits was required in order to assist each carrier to whom a call is routed in identifying the call as a payphone-originated dial-around call. *First Payphone Order*, 11 FCC Rcd 20575 ¶66. When the Commission initially extended the deadline for LECs to provide payphone-specific coding digits, the Commission recognized that PSPs have no control over the network.

must assure, that the LEC actually sent the payphone-specific coding digits into the network.¹⁵ The Petition addresses this erroneous conclusion reached by the Court of Appeals. APCC agrees with the analysis contained in the Petition. The Commission should also make clear that it agrees with the Petition and grant the Petition.

In summary, PSPs *are* responsible for subscribing to payphone *lines* that have the payphone-specific coding digits capability,¹⁶ but PSPs are *not* responsible for ordering the delivery of payphone specific coding digits to a carrier or ensuring that the payphone specific coding digits arrive at a carrier's platform.¹⁷ Moreover, the information necessary to determine whether and why calls were received by a Completing Carrier without coding digits is not available to PSPs. The PSP is totally dependent on the carriers to fulfill their tracking obligations.

Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, 12 FCC Rcd 16387, 16390 ¶11 (CCB 1997) (“*Bureau Waiver Order*”). The system ultimately required by the Commission and implemented by the LECs utilized a generic switch software upgrade, Flex ANI, which enabled LECs to provide, for the first time, unique coding digits to identify the calls originating from lines serving “smart” mostly independent PSP payphones. *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 13 FCC Rcd 4998, 5000 ¶ 2 (CCB 1998) (“*Coding Digits Waiver Order*”). Carriers, however, remained free to use technologies or methods of their own choosing to identify and track calls originating from payphones. *First Payphone Order*, 11 FCC Rcd at 20591 ¶ 97. See also *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 13 FCC Rcd 10893, 10902-03 ¶ 18 (CCB 1998) (“*Per Phone Waiver Order*”). Through a rate element included in LECs’ payphone line charges, PSPs paid for LECs’ initial implementation of Flex ANI. *Id.* at 5019 ¶ 35. Previously, LECs had not provided unique ANI coding digits to identify the lines serving “smart” payphones, which are used predominantly by *non*-LEC PSPs. By contrast, calls originating from “dumb” payphones – used almost exclusively by the LECs’ own payphone divisions – were already identifiable by means of a digit pair (“27”) that was “hard coded” into the LECs’ central office switches. The additional payphone-specific coding digits enabled by Flex ANI include “29” for inmate phone lines and “70” for lines serving “smart” phones. *Id.* at 5010 ¶ 20. In addition, a “25” code is used for payphone-originated toll-free calls that are converted to local POTS calls.

¹⁴ See text accompanying notes 5-8, *supra*.

¹⁵ GCB. Slip Op. at 5595

¹⁶ *Coding Digits Waiver Order*, 13 FCC Rcd at 5016-18 ¶¶32-33.

¹⁷ *Id.* at 5020 ¶ 37.

APCC now turns to a discussion of why any approach that would shift the obligation to ensure proper receipt of payphone-specific coding digits to PSPs or to any carrier other than the Completing Carrier would be inconsistent with the Commission's entire DAC regime and would be completely unworkable. APCC bases much of this discussion on its considerable experience working with PSPs and carriers in rectifying problems in the networks, in helping PSPs analyze the data available to them to assess whether the PSPs are receiving proper compensation, and in using the tools available to PSPs to try to understand and assess network issues affecting dial around compensation. APCC also has considerable experience in strategizing with PSPs about complaint proceedings, both formal and informal, at the Commission and on planning and conducting litigation in the courts.¹⁸ APCC also, as part of the billing aggregation services it provides, engages in extensive analysis of the data it receives for its PSP customers, both on an aggregate level and on an individual PSP level to assist in conducting analyses of whether PSPs are being properly compensated. On the basis of that experience, APCC believes that not only is the Court's ruling incorrect in terms of what the Commission has actually ruled as described above, but that in practice, the rule adopted by the Court is unworkable. It will make such collection proceedings as do remain unnecessarily and prohibitively unwieldy and complex and, to the extent it does, could entirely deter PSPs from pursuing their remedies.

A. The Commission's DAC Rules Are Predicated On Completing Carriers—and Not PSPs—Being Responsible for Ensuring Receipt of Payphone-Specific Coding Digits

At the outset, APCC observes that in all the years it has been active in this area, APCC has not encountered a single situation where a LEC voluntarily disclosed when it was failing to send the correct coding digits. The LECs have uniformly taken the position that they are transmitting coding digits correctly. Moreover, APCC is unaware of a single situation where a PSP had any information in advance of a formal legal proceeding as to whether the LEC had transmitted the correct coding digits. As explained in the Petition,¹⁹ there are so many possible

¹⁸ See note 2, *supra*.

¹⁹ Petition at 21-22.

points of failure, and the performance of Flex-ANI is so subject to even minute to minute fluctuation, that even where a Flex-ANI failure is detected,²⁰ it is seldom, almost never, possible for the PSP to run it to ground given that the PSP has no access to the records generated in the carriers' network(s). Moreover, as is clear from the Petition, given the possible points of failure at both the LEC and other carrier levels and the constant network activity to respond to new service initiation, service configuration, etc., it is not uncommon for errors to occur.

IXCs, including SBRs, who are generally in the best position to detect coding digits failures and to initiate corrective steps, are reluctant to and generally don't devote resources to doing so, as the immediate result is to increase the amount of their dial-around compensation payments they are required to make. Moreover, devoting resources to these issues certainly yields no additional revenue, and expending these resources is not maintenance or repair necessary to retain an existing customer or revenue stream.

LECs, who do not derive any revenue from the provision of Flex ANI and have many of the same motivations (or lack of motivations) as the IXC, are generally equally indifferent to whether the correct coding digits are transmitted. The only major issue for the carriers involved is the extent to which they have to worry about discovery of the problems by and sanction from the regulatory authorities. Given the complexity of discovering and finding the problems, and the resource constraints and other priorities facing the FCC, carriers have not viewed this as a credible threat.

²⁰ As explained in the Petition, at note 45, most of the major Completing Carriers who are also Intermediate Carriers have established test lines that allow PSPs to dial a toll free number on the carrier's network and get a message telling the technician what coding digits accompanied the call. Level 3, the Intermediate Carrier involved in *GCB*, does not have a test line and has declined to provide one. It is important to note that the test lines, while useful, provide only limited information. Results are valid only on a real time basis. At any point in time (and, of course, without the knowledge of the PSP when such events are occurring), any of the kinds of network changes, facilities additions or deletions, etc., discussed in the Petition can be occurring. Moments or seconds after the test call, there could be a change in the LEC or IXC network that could affect whether Flex ANI is functioning properly and whether the coding digits have changed. The PSP would not discover the problem until the PSP returns to the location and retests on another maintenance run.

Thus, it is extremely unlikely that PSPs will be able to know whether Flex ANI is or was working properly at any given moment. Moreover, PSPs, who in contrast to LECs and carriers, *do* have an incentive to correct coding digits failures, have little leverage with the LEC (since there generally is no choice of provider)²¹ and the least information about and ability to detect and correct failures, and must overcome the institutional and other inertia of the LECs and IXC. Moreover, even the very limited information generally available to PSPs – *i.e.*, Completing Carrier and Intermediate Carrier reports – is not required to include any information about ANI coding digits. These reports will at best contain only an indirect indicator of a problem (a falloff in payment for completed calls, for example, may be attributable to any number of factors, or the payment by a carrier of a surrogate flat rate per phone rather than per call payment). And these reports do not usually arrive until three to six months after coding digits failures may have occurred.

The Commission has recognized the PSPs' lack of visibility and lack of information about what happens to a call once it enters the network. The Commission took explicit notice of it in the *Tollgate Order*,²² in which the Commission amended its dial-around compensation Rule. In a partial effort to address the issue, the Commission required carriers to provide some information to PSPs on a quarterly basis. These include Intermediate Carrier and Completing Carrier reports,²³ the contents of which are discussed below. But what is noteworthy about those reports here, again, is that they *do not contain any coding digit information*. Indeed, the Commission recognized that the main way PSPs would be able to use the information contained in the then newly required Intermediate and Completing Carrier reports would be to engage in a comparative analysis that allowed PSPs to use payment ratios (calls sent to a Completing Carrier by its Intermediate Carrier as compared to calls paid and reported by the Completing Carrier) as

²¹ If the PSP is served by a CLEC, the PSP may have more leverage to request that the CLEC work diligently with the ILEC to gather information if a problem is suspected.

²² *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 18 FCC Rcd 19975, 19983 ¶18, 19987, ¶25 (2003) ("*Tollgate Order*"); *Tollgate Reconsideration Order*, 19 FCC Rcd 21457. (2004) ("*Tollgate Reconsideration Order*").

²³ See 47 CFR §§ 64.1310(a)(4),(c).

a signal that a carrier may be under-paying.²⁴ Thus, for whatever limited value they may have in helping a PSP or its aggregator draw inferences about what *may be* happening inside a network, they do not provide any actual information about coding digits.

Nor were they intended to do so. Moreover, the reports required by the Commission are all reports provided by carriers in their role as Intermediate Carrier or Completing Carrier. There are *no* reports required of LECs at all in their role as LEC or provider of dial tone service to PSPS.²⁵ Presumably, if the Commission had intended for PSPs to have to present information or have knowledge about whether coding digits are in fact being delivered by a LEC, and to bear the burden of demonstrating that the LEC was in fact providing or had provided the coding digits to accompany each individual call, the Commission would surely have provided for carriers and/or LECs to provide at least some information about whether the LEC was in fact transmitting the coding digits. But there is not a single such requirement.

By contrast, the *Tollgate Order* codified a specific, unequivocal call tracking obligation on Completing Carriers. The Rule provides:

Each Completing Carrier shall establish a call tracking system that accurately tracks coinless access code or subscriber toll-free payphone calls to completion.²⁶

There are no exceptions to this tracking obligation for calls that arrive at a Completing Carrier's platform without payphone-specific coding digits. Accordingly, it is the Completing Carrier's obligation to accurately track the calls.

²⁴ *Tollgate Order*, 18 FCC Rcd at 20003 ¶52; *Tollgate Reconsideration Order*, 19 FCC Rcd at 21472 ¶25. As discussed below, this is precisely the kind of analysis typically engaged in by PSPs.

²⁵ To the extent a LEC is also an Intermediate Carrier or a Completing Carrier, the LEC will have to comply with the Commission's reporting requirements for carriers in that status, but the reports will contain only the information required of an Intermediate or Completing Carrier, not any information about the LEC activities.

²⁶ 47 CFR § 64.1310(a)(1).

Moreover, from the outset, the Commission made clear that it is the IXC's obligation to "request, test, and coordinate with LECs to obtain [Flex ANI] service under carrier to carrier procedures to ensure that there are no problems in providing and receiving the FLEX ANI digits for a particular IXC or LEC."²⁷ A Completing Carrier may opt to use a method other than Flex ANI to identify calls from smart payphones.²⁸ Thus, under the *Tollgate Order*, if a Completing Carrier chooses to use payphone-specific coding digits, responsibility to ensure that it receives proper coding digits is thus included in the tracking obligations assigned to the Completing Carrier.

That should conclude the analysis. It is clear that the Commission never intended for PSPs to have to prove that the LEC in fact sent the coding digits. The carriers have the visibility inside their networks. By imposing on Completing Carriers the duty to track payphone calls accurately, the Commission meant to have the Completing Carrier monitor its own network and ensure that the Completing Carrier is receiving the information necessary to perform its obligation to accurately track. That in turn carries the need for accuracy vertically in the network. The Completing Carrier will engage with the Intermediate Carrier to ensure that the digits are being delivered²⁹ and the Intermediate Carrier will in turn be compelled or motivated to engage with the LEC to ensure that the digits are being transmitted. By contrast, even if a PSP could ensure that the LEC were transmitting the coding digits, it would not necessarily have any impact on the vertical movement of the digits through the network given the host of intermediate

²⁷ *Coding Digits Waiver Order*, 13 FCC Rcd at 5020 ¶ 37 (CCB 1998). Flex ANI is included in LECs' exchange access tariffs as a non-chargeable option for IXCs. *Id.* at 5019 ¶ 36.

²⁸ *First Payphone Order*, 11 FCC Rcd at 20591 ¶ 97; *Bureau Per Phone Order*, 13 FCC Rcd at 10902-03 ¶18. In fact some carriers do rely on another method in lieu of or in addition to Flex ANI. Whatever tracking method the carrier chooses, however, must ensure that the carrier is able to identify payphone calls.

²⁹ In the *Tollgate Order*, the Commission specifically required each Intermediate Carrier to whom a dial-around call is routed to transmit the payphone-specific coding digits to the next carrier in the chain. *Tollgate Order*, 18 FCC Rcd at 19992 ¶ 35. If an Intermediate Carrier fails to do so, the Completing Carrier may have a claim against the Intermediate Carrier for breach of the latter's obligation to transmit the coding digits. Moreover, resolution of such claims may be affected by the terms of any contract or tariff governing the relationship between the carriers since the Completing Carrier and Intermediate Carrier are ordinarily in a customer-supplier relationship. That is a matter between the carriers, however. PSPs have no obligation, or means, to regulate this relationship..

carriers, transport providers, etc. and the varying technologies and platforms those intermediaries may use to perform their functions. The only practical way to ensure that the coding digits accompany the call through each leg of the network and that the information the Completing Carrier may need to properly track payphone calls will be there when the call reaches the Completing Carrier is to make the Completing Carrier responsible for ensuring that the calls are reaching the platform with that information. This is the Rule the Commission adopted, and the Commission should affirm it by granting the Petition.

B. Holding PSPs Responsible for Ensuring That the LEC Has Transmitted Payphone Specific Coding Digits Would Be Completely Unworkable

Not only did the Commission not intend for PSPs to have to show that the LEC actually transmitted the coding digits, PSPs simply have no way of meeting the burden imposed by the Court of Appeals. And the ruling will complicate both the efforts of PSPs to collect dial around compensation and place extra burdens on the forums where those cases may be heard.

Before turning to a few examples to illustrate these points, it is important to emphasize that most PSPs are very small enterprises. For example, over 80% of APCC Services' customers have no more than 250 payphones with more than two thirds of those customers having no more than 50 payphones. The remainder of the customers while slightly larger are also small businesses with the overwhelming majority having under 1000 payphones. They have few resources with which to engage in sophisticated data analysis, and even fewer resources with which to contemplate litigation.³⁰

In a typical case an individual PSP experiencing a decline in dial around revenue³¹ will have available Intermediate and Completing Carrier reports for its own payphones. The PSP

³⁰ The majority of all reported cases have been pursued by aggregators such as APCC Services, *see e.g., APCC Services, Inc. v. WorldCom*, 305 F. Supp. 2d, (D. D.C. 2001); *APCC Services, Inc., v. Radiant Telecom, Inc.*, 23 FCC Rcd 8962 (2008), or involve coalitions of individual companies (usually the then larger companies. *See, e.g., Davel Communications, Inc. et al., v. Qwest Corp.*, 460 F.3d 1075 (9th Cir 2006).

³¹ All discussion in the text assumes the analysis of data by PSPs and/or PSP aggregators is taking account of variables other than the failure of coding digits or other carrier and/or network failures on dial around revenues.

may also have available some of its own data showing calls dialed from its own payphones if the equipment has the capability to gather, store, and transmit the data. (This data is referred to as SMDR (for station message detail record) data.) However, even with SMDR data, there will be no direct coding digit data available.

The situation facing the PSP, as in the situation in *GCB*, illustrates precisely the dilemma and why the Commission intended for the PSP to be able to hold the Completing Carrier accountable rather than proceeding against carriers simply out of total uncertainty. As the basis for deciding whether to initiate proceedings, the PSP would review the data made available by carriers under the Commission's rules, as the Petitioners did. The Intermediate Carrier(s) Report(s) would show the number of calls to Completing Carriers by ANI and by 8yy code. Each Completing Carriers report would show calls paid by (but not the number of calls reaching) that carrier by ANI by 8yy code.

By comparing the number of calls sent by each of the Intermediate Carriers to each Completing Carrier to the number of calls paid by each Completing Carrier, the PSP would be able to see if any of the Completing Carriers was paying on a disproportionately low number of calls from the PSP's payphones as compared to the number of calls that Completing Carrier received from its Intermediate Carrier(s) and other carriers. Of course, the PSP has no way to know whether the number of calls paid by the Completing Carrier is disproportionately low because the number of calls reaching the Completing Carrier's platform is less than the number shown in the Intermediate Carrier report or whether it is because the carrier is completing (or detecting or reporting completing) a disproportionately low number of calls, or some combination of these and/or other factors.³²

These variables include recurring and continuing factors such as the season of the year, the general decline in payphone traffic, etc., and one-time occurrences, such as floods, etc.

³² If SMDR data is available, that data might provide some insight of a Flex-ANI issue but at a different layer of the network. Discrepancies between the SMDR call detail records and the calls shown on the Intermediate Carrier report(s) could indicate a Flex-ANI problem between the LEC and the Intermediate Carrier but the discrepancies would not reveal whether the source of the problem was at the LEC level or the Intermediate Carrier level. In any event, the discrepancies between the SMDR data and the Intermediate Carrier(s) report(s) would not

If the low-paying Completing Carrier receiving calls from a particular Intermediate Carrier were the only Completing Carrier receiving calls from the Intermediate Carrier and that same Completing Carrier were the only one paying disproportionately low, it would be reasonable to assume that the other Intermediate Carrier(s) and their respective Completing Carrier(s) were receiving proper coding digits from the LEC, assuming they were tracking by coding digits. If the breakdown in coding digit transmission were between the LEC and the Intermediate Carrier sending calls to the low-paying Completing Carrier, the calls would not be showing up on the Intermediate Carrier report. Therefore the breakdown must be between the Intermediate Carrier and the low-paying Completing Carrier. Since it is the Completing Carrier who is responsible for paying for the calls, the logical thing to do would be to bring an action against the Completing Carrier.³³ As discussed above, if the Intermediate Carrier failed to deliver the coding digits, and the Completing Carrier will experience loss as a result, the Completing Carrier is in the best position to manage its relationship with the Intermediate Carrier.³⁴

Under the Court's ruling here at issue, the PSP will have, however, to produce evidence that the LEC in fact transmitted the coding digits into the network. This will substantially increase the evidentiary burden not just on the PSPs and other parties, but on the process in the chosen forum as well. Obviously, it will complicate the litigation and mean more esoteric and

explain why the Completing Carrier was paying on a disproportionately low numbers of the calls the Intermediate Carrier was in fact showing it had sent to the Completing Carrier.

On the other hand, if the SMDR data were consistent with the calls the Intermediate Carrier reported sending to the Completing Carrier, that would show the Flex-ANI problem was between the Intermediate Carrier and the Completing Carrier.

³³ To make the example concrete, in *GCB*, USSC was the only Completing Carrier receiving calls from Level 3 and not paying on a number of calls reasonably within the range paid by all Completing Carriers receiving calls from Petitioners' payphones. Since all the Completing Carriers except USSC seemed to be paying within a reasonable range, it seemed reasonable to presume that they were receiving the correct coding digits from the LEC and/or their respective Intermediate Carrier(s), and thus that the LEC was properly transmitting the digits. That meant that the breakdown was happening at either the Level 3 or USSC level, but Petitioners had no way of knowing which. Since USSC was the completing carrier responsible for paying for the calls under the Commission's regulations, Petitioners sued USSC. Moreover, some analysis of available SMDR data showed that the call detail was consistent with the calls Level 3 was reporting in the Intermediate Carrier reports.

³⁴ See note 29, *supra*, and accompanying text.

difficult to deal with data to be addressed. As a practical matter, it is not clear what the easiest way to obtain and introduce the data will be. While compulsory process directed to the LEC is a ready answer, third party subpoenas are difficult to obtain and will complicate what is already complex litigation. Since it is easier to obtain information from a party, an easier way to get the information is to also make the LEC a party to the proceeding. While the procedures for conducting multi-party litigation can be challenging, particularly at the Commission³⁵ where any litigation involving a LEC is likely to be conducted,³⁶ if the PSP is going to have to deal with the data anyway, and is going to have to face off against the LEC, the latter course has the virtue from the PSP's perspective of putting the LEC, an additional party, at risk if there is a coding digit failure.

Thus far, the analysis has focused on the effect of the Ninth Circuit's holding on the analysis likely to be done by an individual PSP. The ruling is also likely to have a similar effect on the analysis and conduct of APCC, the independent PSP industry's main aggregator and representative.

APCC collects dial around compensation for literally hundreds of thousands of payphones. As the aggregator for the PSPs who own these payphones, APCC receives the Intermediate and Completing Carrier reports for the payphones, and it receives reports from all the clearinghouse/aggregators that process dial around compensation for carriers. As such, APCC is in a position to have a macro-view of carriers and the relationships between them to the extent the information can be gleaned from the extremely limited visibility provided by the

³⁵ The Commission's rules allow for multiple defendants in only limited circumstances but also provide for consolidation of actions. See 47 CFR §1,735.

³⁶ While the Commission has in numerous orders directed the LECs to provide Flex-ANI there is no Commission regulation requiring the LECs to provide Flex-ANI. And even if there were, such a regulation would not form the basis for court action since the Commission has not made a determination that a failure to establish an accurate call tracking system is an unreasonable practice under Section 201(b), 47 USC §201(b). *Global Crossing Telecomms., Inc. v. Metropoulos Telecomms., Inc.*, 550 U.S. 45 (2007). Presumably the Commission would entertain a complaint against a LEC for a violation of a Commission order under Section 416(c) even in the absence of a regulation. See *Metorphones Telecoms., Inc. v. Globa Crossing Telecomms., Inc.*, 423 F.3d 1056, 1071 (9th Cir. 2005).

reports. And of course because it has the reports for all carriers handling payphone traffic, APCC is able to aggregate information about both Intermediate Carriers and Completing Carriers that may reveal information about carriers that an individual PSP may not see because it is not apparent from the smaller amount of information the PSP receives when looking at information for only its own phones. An obvious example is that a Completing Carrier who is paying on a disproportionately low number of calls as compared to the number of calls being sent to the carrier by its Intermediate Carrier(s) but whose call volume from the payphones of any individual PSP is too low to catch the attention of or justify the use of an individual PSP's resources but whose aggregate call volume is sufficient to warrant attention and make pursuing the deficiency economically viable.

An example also makes plain why the notion that PSPs have to show that the LEC in fact sent Flex-ANI issues is unworkable. We note that although the discussion at this point concerns a situation where APCC as an aggregator has to deal with multiple LECs, a similar set of issues is likely to confront even a medium sized PSP contemplating pursuing a collection effort, since even a medium sized PSP will typically operate in a geographic area that is much larger than the area served by a single end office or even a single exchange or LEC. Moreover, the problem of having to deal with the LEC will be the same even if only a single LEC is involved.

APCC Services receives data from dozens and dozens of Intermediate and Completing Carriers. Focusing on a middle-sized Completing Carrier who is an SBR, and assuming there is a reason to look more closely at this carrier and ultimately to initiate a proceeding, for 3Q10, the carrier received 487,759 calls from its Intermediate Carrier(s). Those calls originated from 72,321 ANIs located in 20,598 NPA-NXXs. Even though the ANIs and NPA-NXXs will in most instances tend to be concentrated in the largest LECs, they are likely to have come from hundreds of end offices, depending upon the way the serving LEC has its service configurations within the NPAs.³⁷ Collecting the call records would involve gathering records from dozens and dozens of locations and in all likelihood costly compulsory process proceedings and/or costs.

³⁷ APCC Services does not have access to the databases necessary to determine how many end offices would be involved for the NPA-NXXs.

Moreover, not only major LECs will be involved. Smaller LECs also become involved. Thus, while Flex-ANI data might need to be obtained from a limited number of companies, records from many, many end offices would have to be brought together.

Moreover, it is not a simple task of calling up the switch records for the calls in question. As APCC Services' experience in multiple litigations has shown, to find the switch records for the payphone calls (assuming they exist, a point to which we return in a moment), the first task would be to find the payphone call switch records from among the billions of call records generated by the LEC(s) in question. In APCC Services' experience, payphone call and switch records are integrated in other call and switch records, and getting the payphone call and switch records sorted out is an arduous process that takes a lengthy period of time (months) and is expensive (in the multiple tens of thousands of dollars and depending on the call volumes, even in the millions of dollars).³⁸

There is also no guarantee that the call records to show that the coding digits accompanied the calls would exist. Since litigation over payphone compensation usually lags several quarters because of the built in delays in the payment process³⁹ and it takes a few quarters of data to document a low paying pattern, by the time a proceeding is initiated and gets to the discovery phase, any one or more of the LECs could be beyond its record retention period. If the requirement is that coding digits must have accompanied each call, presumably there would have to be a record for each call, or there will be new litigation to resolve what is an adequate showing that the digits were sent. And what will happen when there is a showing that

³⁸ The LECs will not have had reason to be archiving call records for origination payphone calls any differently than the other call traffic traversing the end office and so the payphone call records will have to be extracted from more general archives

³⁹ Payphone compensation is paid with a two quarter lag.

the LEC did transmit the digits, but the Completing Carrier produces records showing it did not receive the digits?⁴⁰

Even at the level where the claims of multiple PSPs are aggregated for proceeding, the logistics and costs of this type of litigation would defeat the economics of the litigation. In essence, the Commission would have given these Completing Carriers a functional waiver from paying compensation and defeated the statutory right of PSPs to be compensated on each and every call. But the Commission cannot exempt any Completing Carrier from paying per call compensation without providing for the PSP to be compensated by another carrier or otherwise to be compensated.

Moreover, we have focused on just a single example. There are of course a number of carriers, all SBRs, who fit the profile of the example cited in the discussion above.

There are even more carriers with lower volumes against whom dial around claims could not be economically asserted. The Commission would also have given these carriers a functional exemption in derogation of Section 276's requirement.

Litigation or complaint proceedings against carriers is already extremely expensive, complex, burdensome, and prohibitive in many, many instances. The interpretation given by the Court threatens to make it more so and to functionally exempt many carriers from having to pay dial-around compensation. The Commission did not intend that and its Rule does not require it. Indeed, as discussed above, the Rule is otherwise. The Commission should affirm its Rule by granting the Petition.

In sum, the effect of adopting the Ninth Circuit's view of Commission's Rule will be to increase the complexity of litigation and collection efforts for PSPs in numerous ways even

⁴⁰ Presumably, that is similar to what happened in *GCB* in the District Court. The plaintiffs, the Petitioners herein, produced evidence (but not actual call records) that the LECs had transmitted the digits with the unpaid calls and USSC produced its call records which did not show the digits. *See also* note 29, *supra*.

when the analysis a PSP or an aggregator such as APCC can conduct on the basis of available data would not otherwise lead to such complex and potentially multi-party litigation. PSPs are small entities, and neither they nor their aggregators attempting to collect on their behalf can afford the litigation burden they already bear under the Commission's Rule. Allowing the Ninth Circuit's interpretation of a PSP's responsibilities would violate Section 276 and the Rule by defeating the PSPs' right to collect compensation for each and every call. The Commission should reject the rule adopted by the Ninth Circuit and instead rule that a PSP has met its obligations under the Commission's Rule by ordering payphone line service from the LEC.

II. The STATUTE AND THE COMMISSION'S RULES REQUIRE THAT A COMPLETING CARRIER THAT DOES NOT RECEIVE PAYPHONE SPECIFIC CODING DIGITS MUST NONETHELESS PAY COMPENSATION AND IS NOT RELIEVED OF ITS TRACKING AND PAYMENT OBLIGATIONS UNDER THE RULE.

In any declaratory ruling on the subject of carriers' liability to pay dial-around compensation, the Commission must start from the undeniable premise that, under Section 276 of the Communications Act, PSPs are entitled to compensation for "each and every" completed payphone call, except "emergency calls and telecommunications relay service calls for hearing disabled individuals," and it is the responsibility of the Commission to ensure that this objective is met.⁴¹ There is no exception in the statute nor is the Commission given authority to carve out any exceptions (except for those explicitly specified in the statute) for any calls that reach the Commission's designated payor, including calls reaching the payor, without payphone-specific coding digits. Given the clear, unequivocal language of the statute, the Commission has no authority to create additional exceptions, by waiver or otherwise. No changes or clarifications of the Commission's implementing rules can deprive PSPs of their statutory rights to be compensated for every completed call. If carriers are relieved of the obligation to pay for calls

⁴¹ 47 U.S.C. § 276(b)(1)(A) ("the Commission shall . . . prescribe regulations that establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call . . .").

not accompanied by payphone-specific coding digits, there would be a class of calls for which the Commission would have barred from compensation in violation of the statutory right.

In its 2003 *Tollgate Order*, the Commission amended the rules implementing Section 276, effective July 1, 2004. The Commission shifted responsibility for payment for switch based reseller (“SBR”) calls from the “first underlying facilities based carrier” to the Completing Carrier (which was defined to include SBRs) “to ensure that PSPs are ‘fairly compensated’ for all SBR completed calls made from their payphones under Section 276 . . .”⁴² The Commission thus amended its dial around compensation scheme to make sure all compensable calls were being captured.

Liability for payment of compensation for dial-around calls was placed unequivocally on the Completing Carrier. As modified, the Rule states:

*Except as provided herein, a Completing Carrier that completes a coinless access code or subscriber toll-free payphone call from a switch that the Completing Carrier either owns or leases shall compensate the payphone service provider . . .*⁴³

The language of the rule is unambiguous. The Completing Carrier “shall compensate” the PSP, and the only exceptions to the Completing Carrier’s compensation payment obligation are those provided in the Rule itself.⁴⁴ As with the statute, there is no exception in the rule for calls that arrive at the Completing Carrier’s platform without payphone-specific coding digits.

⁴² *Tollgate Order* at 18 FCC Rcd at 19976 ¶2.

⁴³ 47 C.F.R. § 64.1300(b) (emphasis and this footnote added). The Rule states that if the Completing Carrier and PSP do not agree on a rate, the Completing Carrier must pay the “default” rate of \$.494 per call. *Id.*, § 64.1300(b),(d). The *Tollgate Order*, 18 FCC Rcd at 20000-01 ¶ 48, and the *Tollgate Reconsideration Order*, 19 FCC Rcd at 21464-70 ¶¶ 13-21, both discussed the authority of PSPs and Completing Carriers to enter into alternative compensation arrangements.

⁴⁴ *Id.* The only exceptions are for “calls to emergency numbers, calls by hearing disabled persons to a telecommunications relay service or local calls for which the caller has made the required coin deposit.” *Id.*, §64.1300(c).

The Commission thus has in place a regulatory regimen that covers compensation for all calls placed from payphones and specified the party responsible for tracking⁴⁵ and paying for each call in accordance with Section 276. “The Commission found that this compensation plan [adopted in the *Tollgate Order*] satisfied Section 276’s directive that PSPs be ‘fairly compensated’ for each and every completed call.”⁴⁶ If the Commission now provides relief from its payment obligation for any carrier currently obligated to pay compensation for any class of calls, for any reason, the Commission must designate who is responsible to pay for those calls in order to remain in compliance with the statutory mandate of ensuring compensation for each and every call.

Certainly there is no basis in either the statute or the implementing regulations for a Commission ruling that the Completing Carrier’s tracking and payment obligations are somehow nullified if the Completing Carrier does not receive payphone- specific coding digits for a call. Although Flex ANI was installed in LEC switches as an additional option for the carriers, its use for tracking is a voluntary choice of the carrier.⁴⁷ No particular method for tracking was mandated by the Commission.⁴⁸ As we have explained above, even if a Completing Carrier elects to use the Flex ANI coding digits to satisfy its tracking obligation, the Completing Carrier must ensure that it *does* receive such coding digits.

Moreover, if the Commission desires to provide relief from any of these regulations and responsibilities, it can only do so in a rulemaking. All of the current requirements, as discussed above, were adopted in rulemaking proceedings. The Commission must follow its usual procedures in changing the dial around obligations of carriers and imposing new obligations.⁴⁹ In

⁴⁵ See discussion in Section I(A), *supra*.

⁴⁶ *Tollgate Reconsideration Order*, 19 FCC Rcd at 21460 ¶7 (citations omitted).

⁴⁷ *First Payphone Order*, 11 FCC Rcd at 20591 ¶ 97; *Per Phone Payment Order*, 13 FCC Rcd at 10902-03 ¶18.

⁴⁸ *Id.*; *Tollgate Order*, 18 FCC Rcd at 1994 ¶39.

⁴⁹ *Sprint Corporation v. FCC*, 315 F.3d 369 (D.C. Cir. 2002).

the rulemaking, the Commission could also address who will be responsible for paying for the calls for which the Commission is providing relief in order to maintain a dial-around scheme that complies with the statutory mandate.

In short, coding digits failures cannot justify the Commission in either failing to implement its Section 276 mandate to ensure that PSPs are compensated for every call or in relieving Completing Carriers of their compensation obligations under the Rule and under the statute. The Commission cannot relieve Completing Carriers of compensation liability for calls lacking the proper coding digits without simultaneously determining who *is* liable to pay the compensation to PSPs for those calls. To do so would leave a gaping hole in the compensation scheme. The Commission must rule that Completing Carriers remain liable for paying compensation regardless of whether the Completing Carrier receives payphone-specific coding digits.

CONCLUSION

For the foregoing reasons, the Commission should grant the Petition and rule that (1) the PSP's only obligation with respect to payphone-specific coding digits is to order a payphone line from the LEC and (2) if a PSP has done so, the Completing Carrier must pay compensation for payphone-originated calls regardless of whether the Completing Carrier received payphone-specific coding digits with the calls in question.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2011, an electronic copy of the foregoing Comments of the American Public Communications Council and APCC Services, Inc., were delivered to the following parties as indicated:

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